No. 97-209

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1997

ROBERT J. TOLCHIN, individually and on behalf of all others similarly situated,

Petitioner,

v.

THE SUPREME COURT OF THE STATE OF NEW JERSEY, *et al.*,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For the Third Circuit

BRIEF OF RESPONDENTS SUPREME COURT OF NEW JERSEY, ROBERT WILENTZ, STEPHEN W. TOWNSEND, THE NEW JERSEY STATE BOARD OF BAR EXAMINERS, AND SAMUEL J. UBERMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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On the Brief

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QUESTIONS PRESENTED

1. Whether the Third Circuit properly applied the balancing test found in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), in finding that the New Jersey Supreme Court's standards for the practice of law in its jurisdiction do not violate the dormant aspect of the Commerce Clause, to the extent that they require all attorneys who wish to practice in New Jersey to maintain a bona fide office in that state, regardless of domicile.

2. Whether the Third Circuit properly concluded that the standards established by the New Jersey Supreme Court for the practice of law in that jurisdiction violate the dormant aspect of the Commerce Clause, to the extent that they require that all attorneys complete a skills and methods course which mandates in person attendance at course sites in New Jersey.

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ROBERT J. TOLCHIN, individually and on behalf of all others similarly situated,

Petitioner,

v.

THE SUPREME COURT OF THE STATE OF NEW JERSEY, ROBERT WILENTZ (intended to be the Chief Judge of the Supreme Court of New Jersey, STEPHEN W. TOWNSEND (intended to be the Clerk of the Supreme Court of New Jersey, THE NEW JERSEY STATE BOARD OF BAR EXAMINERS, SAMUEL J. UBERMAN Intended to be the Assistant Secretary of the New Jersey Supreme Court who plaintiff believes to direct the State Board of Bar Examiners), THE NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION and JOSEPH J. HOGYA (intended to be the Institute for Continuing Legal Education Skills Training Course Director),

Respondents.

On Petition For A Writ of Certiorari To the United States Court of Appeals For The Third Circuit

Brief of the Respondents

COUNTERSTATEMENT OF THE CASE

It is well established that, "(s)ince the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States...." *Leis v. Flynt*, 439 U.S. 438, 442 (1979). In carrying out this function, the Supreme Court of New Jersey has established basic qualifications for the practice of law in its jurisdiction which go beyond the mere possession of a plenary license. First, every attorney wishing to practice law in New Jersey must maintain a "bona fide office" in the State. N.J.Ct.R. 1:21-1(a). Such an office is described as "a place where clients are met, files are kept, the telephone is answered, mail is received, and the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable amount of time." *Id.* In addition, all New Jersey attorneys must complete a "skills and methods" course approved by the New Jersey Supreme Court. The requirements of that course, which is presented by respondent New Jersey Institute for Continuing Legal Education ("ICLE"), include mandatory in-person attendance at lectures, which are offered at sites throughout New Jersey. *Ibid.* Both requirements apply to both resident and non-resident attorneys.

Petitioner Robert Tolchin is admitted as an attorney and practices law in New York. Tolchin has passed the New Jersey bar and been licensed in New Jersey; however, he has indicated that he is unwilling to attend a "skills and methods" course at a location in New Jersey, or to maintain a bona fide office in New Jersey. Therefore, Tolchin challenged these standards in the United States District Court for the District of New Jersey, arguing that they violate the Commerce, Equal Protection, and Privileges and Immunities Clauses of the Constitution. Tolchin's Complaint also raised

an additional argument that the standard requiring mandatory attendance of the skills and methods course lectures deprived him of Due Process, because the New Jersey Board of Bar Examiners had not adopted rules governing the course format and curriculum. The District Court rejected Tolchin's claims and granted the defendants' motions for summary judgment.

Tolchin's petition seeks review of the decision of the Third Circuit affirming the grant of summary judgment. His petition raises only the argument that the New Jersey Supreme Court's standards violate the Commerce Clause. Tolchin has apparently abandoned his claims that the standards also violate the Privileges and Immunities, Equal Protection, and Due Process Clauses, all of which were also rejected by the Third Circuit.[1]

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[1] The Third Circuit rejected Tolchin's claim that R. 1:21-1(a) violates the Privileges and Immunities Clause because both of the challenged requirements affect in-state and out-of-state lawyers in a substantially equal way. Moreover, the rule's requirements provide a reasonable means for New Jersey to protect its legitimate interests in regulating the quality of its bar. (App. 32).

Similarly, the Third Circuit rejected Tolchin's Equal Protection challenge to the bona fide office and course attendance requirements, finding that both of the New Jersey Supreme Court's requirements were rationally related to its interest in regulating the practice of law. (App. 35-36).

Finally, Tolchin claimed that the attendance requirement of the skills and methods course deprived him of rights without Due Process, because the New Jersey Board of Bar Examiners failed to adopt formal rules governing the format and curriculum of that course, as required by N.J.Ct.R. 1:26, which provides that the skills and methods "course format shall be set forth in the rules of the Board of Bar Examiners." The Third Circuit rejected this claim, finding that an agency's failure to follow its own rules is not a per se violation of Due Process. (App. 36). Moreover, the court found that Tolchin made no showing that he relied on N.J.Ct.R.

Tolchin's challenge to the New Jersey Supreme Court's rules invokes the dormant aspect of the Commerce Clause, which "prohibits economic protectionism." *Indiana v. Limbach,* 486 U.S. 269, 273 (1988). Specifically, Tolchin argues that the bona fide office requirement and mandatory attendance requirements, which by their terms apply in exactly the same manner to resident and non-resident attorneys, in fact have such a detrimental effect on non-resident attorneys that they effectively regulate or discriminate against interstate commerce. The Third Circuit rejected this argument, applying well-established standards for the review of Commerce Clause challenges. First, the court determined that the bona fide office and the course attendance requirements do not directly regulate or discriminate against interstate commerce. (App. 19). The Third Circuit therefore applied the balancing test developed by this Court to review state laws whose effect on interstate commerce is minimal or indirect. *See Brown-Forman Distillers Corp. v. New York Liquor Authority,* 476 U.S. 572, 578-79 (1986). This test compares "the local benefits of a regulation with the incidental burdens that it imposes on interstate commerce in order to determine whether the burdens are clearly excessive." (App. 19); citing *C. & A. Carbone, Inc. v. Town of Clarkstown,* 114 *S. Ct.* 1677, 1679 (1994).

Reviewing the bona fide office rule in this manner, the Third Circuit found that any differential impact that this requirement may have on out-of-state lawyers is the consequence not of a lawyer's status as a resident or non-resident of New Jersey, but rather of "the size and type of an attorney's practice." (App. 17). As the decision notes, "the only attorneys actually burdened by this requirement are those who wish to maintain a small or sporadic practice in

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1:26 to his detriment. (App. 38).

New Jersey." (App. 17). Since it is likely that there are resident attorneys who might wish to maintain a small or sporadic practice, but who are also required to maintain a bona fide office, the rule does not place a significantly different burden on persons wishing to engage in multistate practice. Consequently, the Third Circuit found that the bona fide office requirement does not have a discriminatory impact on interstate commerce. (App. 18).

Similarly, the court found that the mandatory attendance requirement for the skills and methods course does not impose a greater burden on non-resident attorneys. Indeed, as the court noted, this requirement may impose an equal or greater burden on certain New Jersey attorneys, since some locations in New Jersey may be even more distant from course sites than out-of-state locations. (App. 24). Consequently, the Third Circuit concluded that neither requirement has a direct effect on interstate commerce. (App. 19).

Having concluded that the rule did not directly discriminate against interstate commerce, the Third Circuit next considered whether any incidental burdens created by the rules are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Both the bona fide office and the course attendance requirements survived this test. First, the Third Circuit identified the state interest to be served by the bona fide office requirement. As stated by the New Jersey Supreme Court, the purpose of this requirement is to promote attorney competence, accountability and accessibility. (App. 19). See *Matter of Kasson,* 141 N.J. 83, 87, 660 A.2d 1187, 1189 (1995). Although the Third Circuit rejected the idea that requiring an attorney to maintain an office in New Jersey can be justified as a means to assure attorney competence or accountability, it did find that the requirement bears a rational relationship to the goal of assuring attorney accessibility. (App. 21). In making this determination, the

Third Circuit cited the findings of the New Jersey Supreme Court in *Matter of Kasson, supra,* as an example of accessibility problems sought to be addressed by the rule. In that case, an attorney who failed to maintain a bona fide office was disciplined after a state court judge encountered numerous difficulties in contacting him. *Matter of Kasson, supra,* 660 A.2d at 1188. Thus, although the Third Circuit noted that the bona fide office requirement does have a peripheral effect on interstate commence, since to some degree it "limits the mobility of some lawyers and reduces the options for consumers of the services they provide(,)" the court concluded that this burden does not clearly outweigh the rule's beneficial effect on the promotion of a legitimate state interest in attorney accessibility. (App. 22).

The Third Circuit also upheld the requirement for in-person attendance at the approved skills and methods course, which is offered only at sites in New Jersey. It found this requirement to be sufficiently related to its intended educational benefit, which is to ensure that New Jersey attorneys are at least minimally familiar with New Jersey law. As explained by the court, the attendance requirement "ensures that attorneys hear -- if not listen to -- those topics thought to be important by Appellees." (App. 23). Conversely, this requirement creates a substantial burden only for those attorneys who reside a great distance from New Jersey, who presumably make up only a small number of lawyers who wish to practice in New Jersey. (App. 24).

REASONS FOR DENYING THE PETITION

THE THIRD CIRCUIT PROPERLY APPLIED WELL ESTABLISHED PRECEDENT TO REACH ITS DETERMINATION THAT THE NEW JERSEY SUPREME COURT'S STANDARDS GOVERNING THE PRACTICE OF LAW DO NOT VIOLATE THE COMMERCE CLAUSE.

A. The New Jersey Supreme Court's Standards Governing the Practice of Law in New Jersey Do Not Discriminate Against Interstate Commerce Because They Apply Equally to Resident and Non-Resident Attorneys.

Certiorari should be denied because Tolchin's Commerce Clause challenge to New Jersey's requirements for practicing lawyers fails to raise any novel or important issues that require the attention of this Court. Rather, this case involves a simple application of the balancing test that was long ago developed by this Court for review of Commerce Clause challenges to state laws. Applying this test, a state law which is facially neutral, and does not have a discriminatory effect on interstate commerce, will be upheld unless it creates a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc., supra,* 397 U.S. at 137.

The standards for the practice of law in New Jersey established by the New Jersey Supreme Court and set forth in N.J.Ct.R. 1:21-1(a) clearly survive that test. The requirements for a bona fide office and for course attendance apply equally to in-state and out-of-state attorneys, and have only a minimal or incidental effect on interstate commerce. They also reflect a rational method for the achievement of New Jersey's legitimate objective, which is to establish appropriate standards for the practice of law in New Jersey.

Therefore, the Third Circuit's rejection of Tolchin's Commerce Clause challenge was clearly correct, and need not be reviewed or disturbed by this Court.

The Third Circuit's analysis of the bona fide office and course attendance requirements turns primarily on the fact that the rules apply in exactly the same manner to in-state attorneys as to out-of-state attorneys, and that any incidental burden on the ability of out-of-state lawyers to participate in New Jersey practice is minimal. Indeed, as the court noted, the requirement that an attorney maintain an office in New Jersey imposes an equal financial burden whether the attorney practices primarily in or outside of the state. Stated differently, the minimum cost of practicing law in New Jersey, which is the cost of maintaining a bona fide office in that state, is exactly the same regardless of whether the attorney has offices in another state as well. Similarly, depending on the location of the skills and methods course sites, in-person attendance may be equally, or more, inconvenient for a lawyer in a remote part of New Jersey than it may be for some out-of-state lawyers.

Tolchin argues that the out-of-state lawyer suffers more from the bona fide office requirement because he incurs an additional expense by opening a New Jersey office, which presumably will be in addition to the office which he has in his home state.[2] The Third Circuit examined this assertion and concluded that any incidental financial burden on out-of-state lawyers stems from the fact that such lawyers may wish to maintain an occasional or sporadic practice in New Jersey, rather than from their status as out-of-state lawyers. As the court noted, a New Jersey lawyer also may wish to maintain

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[2]A similar argument was rejected in *Scariano v. Justices of the Supreme Court of Indiana*, 38 F.3d 920, 927, n. 8 (7th Cir. 1994), *cert. denied*, – U.S. --, 115 S.Ct. 2582, 132 L.Ed.2d 831 (1995) (Noting that there is nothing improper with requiring a lawyer who wants to practice in two states to take a bar exam in each state).

an occasional or limited practice, or, indeed, may have other reasons why he might not wish to incur the expense of actually opening an office. The New Jersey lawyer is nevertheless required to incur this financial burden. Thus, the bona fide office rule asks nothing of an out-of-state lawyer that is not also required of New Jersey lawyers.

Thus, although the additional cost of maintaining a New Jersey office may have an effect on the decision of an out-of-state lawyer to maintain a small or occasional practice in New Jersey, the rule will have the same financial effect on a New Jersey lawyer who similarly wishes to maintain a small or sporadic practice. As the Third Circuit concluded, the impact of the rule on any attorney, whether resident or non-resident, is a function of the size of the practice that the attorney decides to maintain, rather than on the location of his primary practice.

It is also clear that the Third Circuit correctly concluded that the requirement for personal attendance at the skills and methods classes in New Jersey has a negligible impact on interstate commerce. Indeed, Tolchin himself makes this point when he argues that out-of-state lawyers are sufficiently accessible to New Jersey courts without a bona fide office, because the majority of out-of-state attorneys who wish to practice in New Jersey are located in cities or areas near New Jersey. If one accepts the assertion that most of the out-of-state lawyers who wish to practice in New Jersey are sufficiently accessible to New Jersey courts from their out-of-state offices, it follows that at least one of the course sites will also be reasonably convenient. Only those lawyers who reside a great distance from New Jersey will be burdened by the need to attend classes, and these persons, as the Third Circuit noted, presumably comprise only a small group. Moreover, although the court did not express this view, a group that is unable to travel to a course site in New Jersey is likely to have inherent accessibility problems.

Therefore, the course attendance requirement does not place an unreasonable burden on out-of-state lawyers.

It is clear from the foregoing that the rules in question do not create different standards or problems for non-resident attorneys. Because resident and non-resident lawyers can practice law in New Jersey on an equal footing, there is no serious issue as to the constitutionality of these requirements that warrants review by this Court.

B. The New Jersey Supreme Court's Bona Fide Office Rule is Appropriately Related to the Goals of Attorney Accessibility, Accountability, and Competence.

Having determined that the burden created by the bona fide office requirement is a minimal one, the Third Circuit also correctly concluded that this burden is outweighed by the state interest in assuring "attorney accessibility for clients, courts, counsel and parties...." (App. 16). In reaching this conclusion, the Third Circuit recognized that accessibility problems had been encountered by New Jersey and, indeed, that there is a reported decision of the New Jersey Supreme Court on the issue. *See In the Matter of Kasson, supra,* 660 A.2d at 1187. In that case, disciplinary action was brought against a Philadelphia lawyer doing business in New Jersey after a trial judge had encountered difficulty locating him. An investigation revealed that the attorney's name was misspelled on a sign where his New Jersey office was supposed to be located, that his letterhead listed his office suite number differently than it was listed at the office building itself, and that, indeed, there appeared to be no suite or office at all. *Id.* at 1188. As the New Jersey Supreme Court noted, "(t)he frustration of a judge's attempt to schedule trial matters when confronted with this situation cannot be tolerated." Id. at 1189. Thus, the state interest addressed by the bona fide office rule includes not only the

need for lawyers to be accessible to clients, but to the bar and judges as well.[3]

Tolchin's own plans with respect to New Jersey practice suggest the inherent problems of attorney unavailability that the rule seeks to address by requiring an in-state office. Specifically, during oral argument before the Magistrate Judge, Tolchin indicated that he was considering relocating his practice to Mexico or the Netherlands, and would continue to represent certain clients in New Jersey actions from such a location (App.71). The difficulties caused by such a distant practice are exactly what the bona fide office requirement is designed to avoid. Moreover, it is worth noting that even if not admitted to practice in New Jersey, Tolchin is not precluded from representing such clients on a *pro hac vice* basis so long as he has a local counsel to satisfy the need for accessibility, and meets the other requirements of such an admission. *See* N.J.Ct.R. 1:21-2. The rules governing the practice of law in New Jersey must regulate not only those lawyers who are located close to New Jersey, but also those whose remote location raises even more serious questions of accessibility.

In addition to accessibility, the New Jersey Supreme Court also believes that its bona fide office rule promotes competence by requiring a commitment to the State which should, in turn, ensure that attorneys are familiar with local custom as well as developments in local law. The rule thus is designed to "ensure that attorneys representing New Jersey clients in New Jersey courts are sufficiently familiar with state law and practice to represent their clients knowledgeably and effectively." *Matter of Kasson, supra,*

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[3] In fact, the rule applies not only to lawyers in a distant forum or country, but to in-state lawyers who may otherwise desire to practice out of the back of their car or in the hallways of the courthouse. Such a practice is prohibited by the rule which requires such lawyers to have a bona fide office where they can be reached either directly or indirectly.

660 A.2d at 1189, quoting *Ingemi v. Pelino & Lentz,* 866 F.Supp. 156, 162 (D.N.J. 1994). As the Iowa Supreme Court stated in explaining the benefits of its similar, but more demanding, rule:

> The ongoing and substantial physical presence contemplated by our office requirement insures... that the applicant ... will.. become proficient in his or her knowledge of Iowa statutes, case law, and procedures. An applicant who does not intend to be present in the Iowa office for a substantial and scheduled period of time, servicing Iowa clients, lacks sufficient incentive to master those matters unique to Iowa law. Occasional forays into the state to service out-of-state clients do not provide this assurance. [*In re Arthur,* 415 N.W.2d 168, 170 (Iowa 1987)].

The bona fide office requirement of N.J.Ct.R. 1:21-1 also provides an important tool in the establishment and enforcement of attorney accountability. Specifically, N.J.Ct.R. 1:21-6(b) identifies records of trust and business accounts that must be maintained by all lawyers, including receipts, journals and ledgers. These records are to be "located at the principal New Jersey office of each attorney... and shall be available for inspection, checks for compliance with this rule and copying at that location by a duly authorized representative of the Office of Attorney Ethics." N.J.Ct.R. 1:21-6. This bookkeeping requirement is designed to "prevent improper recordkeeping by attorneys and to avoid financial impropriety which may result therefrom." Notice to the Bar, issued November 22, 1978 by the Administrative Director of the Courts of New Jersey, 102 New Jersey Law Journal 1 (November 30, 1978). The rule contemplates the use of random audits of these records to encourage proper recordkeeping and to uncover improprieties. *Id.* A bona fide office requirement thus

ensures that all lawyers will have a location within the state where the Court knows it can find their records for audit.

New Jersey clearly has a legitimate interest in assuring that its court officers can easily obtain access to an attorney's trust account and other records, without requiring auditors to travel to another state, or to seek an exercise of another state's jurisdiction in order to obtain their production. The ability to require lawyers to name the Clerk of the Court as their agent for process and to bring disciplinary actions does not fully address New Jersey's concern that it be able to exercise direct supervisory control over the proper handling of attorney trust accounts, nor does it replace the ability to use spot check audits to prevent violations. Disciplinary action following an infraction or impropriety in the handling of a client's trust account is no substitute for the preventive effect that a surprise audit may have on an attorney's bookkeeping practices.

Indeed, because of its close relationship to the recordkeeping requirement, the bona fide office requirement is justified not only by the need to assure attorney accessibility, as found by the Third Circuit, but by the need to maintain attorney accountability as well. The recordkeeping requirement of N.J.Ct.R. 1:21-6(b) provides a further illustration of how the in-state office requirement furthers the State's regulatory interest in the practice of law.

C. The Bona Fide Office Rule Is Consistent With Other Decisions of This Court.

The constitutionality of the New Jersey Supreme Court's bona fide office requirement is also suggested by this Court's discussions of similar state bar requirements in other cases. This Court has not ruled directly on whether a state court's bona fide office requirement, equally applicable to both resident and non-resident attorneys, may be used to promote attorney competence, accessibility, and accountability.

However, in at least one other case it has approvingly discussed, in *dicta,* state bar requirements which seek to promote similar goals by assuring that an attorney has adequate contacts with the practice of law in that state.

This Court approvingly discussed an in-state office requirement in the context of the review of a Virginia residency requirement, challenged as violative of the Privileges and Immunities clause. *Supreme Court of Virginia v. Friedman,* 487 U.S. 59 (1988). Virginia's goal in imposing this condition, which was applicable only to out-of-state lawyers admitted on waiver of the bar examination, was to assure that such lawyers "will have the same commitment to service and familiarity with Virginia law that is possessed by applicants securing admission upon examination." *Id.* at 68. This Court invalidated the residency requirement, but went on to consider whether Virginia could achieve its goals through other, less restrictive means. It found that such means existed in another provision of the same Virginia court rule, which required that "attorneys ... admitted [on motion] show their intention to maintain an office and a regular practice in the state(.)" *Id.* at 68. That requirement, this Court found, was sufficient to ensure "that such attorneys will have an interest in the practice of law in Virginia that is at least comparable to... applicants admitted upon examination." *Id.* at 69.[4] Thus, the Virginia rule

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[4] The Supreme Court of Virginia also argued that the residency requirement "facilitates enforcement" of another requirement, contained in the same rule, that out-of-state lawyers admitted on motion engage in the practice of law in Virginia on a full-time basis in order to qualify for admission. *Id.* at 69. The decision suggests that Virginia could also look to its in-state office requirement "to protect whatever interest the State might have in the full time practice restriction." *Id.* at 69-70. This full-time practice requirement, although it applied only to out-of-state lawyers admitted on motion, nevertheless is clearly more burdensome than a requirement to maintain a bona fide office. This Court, however, did not reject this full-time practice requirement, but rather took it into account as

discussed in *Friedman* involved the use of an in-state office requirement to assure attorney familiarity with State law, as well as to promote a more amorphous concern with assuring a "commitment to service" Virginia. *Id.* at 54.

That case is significant here because it expressly recognizes that an attorney's regular presence and practice in a state may give a state the means to establish his commitment to establishing familiarity with that state's laws. In light of this, the bona fide office rule is correctly viewed as an appropriate exercise of the discretion entrusted to the states to protect the "compelling state interest in the practice of professions within their boundaries," *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975).

Tolchin claims that the Supreme Court of New Jersey's requirement is directly in conflict with the decision of this Court in *Frazier v. Heebe,* 482 U.S. 641 (1987). That case invalidated an in-state office requirement, adopted by the United States District Court for the Eastern District of Louisiana, which applied to non-resident lawyers only. *Id.* at 646. However, *Frazier* is distinguishable from the matter at hand in several significant respects. The most obvious distinction is that the District Court rule, unlike the New Jersey rule, expressly discriminated against out-of-state lawyers. *Id.* Specifically, the Eastern District of Louisiana required that an in-state office be maintained only by attorneys who were not residents of Louisiana. *Id.* at 646. This reason was clearly discussed in the Court's decision as one of the elements that made the in-state office requirement "unnecessary and irrational." *Id.* at 649. As the Court noted, "a resident lawyer with an out-of-state office is

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an objective that could be enforced through the use of an in-state office requirement.

equally as unavailable to the court as a nonresident lawyer with an out-of-state office." *Id.* at 646.

Other significant differences exist as well. Because the *Frazier* Court was reviewing a District Court rule rather than a state court rule, it applied a standard of review that is not applicable here. As the opinion expressly points out, the Court's purpose on review was not to determine the compliance of the rule with basic federal constitutional guarantees, but rather to review its merits, pursuant to the Supreme Court's "inherent supervisory power to ensure that these local rules (of the federal district courts) are consistent with "the principles of right and justice." Id. at 645 (citations omitted); *see also* 28 U.S.C. § 2071. As the decision notes, "the court's supervisory power over federal courts allows the court to intervene to protect the integrity of the federal system, while its authority over state-court bars is limited to enforcing federal constitutional requirements." *Id.* at 647, n. 7. Thus, the concerns which prompted this Court to undertake a full review of the merits of that rule in *Frazier* are not present in the review of the constitutional challenge brought here.

The District Court rule invalidated in *Frazier* also contained other infirmities that are not present in the New Jersey rule. Specifically, that rule mandated that an attorney have an office in the State of Louisiana, but not necessarily in the Eastern District. In fact, "(t)he office requirement does not specify that counsel *be* in the Eastern District, but only that the attorney have an office somewhere in the State, regardless of how far that office is from the courthouse." *Id.* at 650. This aspect of the rule further attenuated its effectiveness in ensuring attorney availability.

Finally, as the *Frazier* decision notes, rules discriminating against non-resident attorneys are more difficult to justify in the context of the federal courts than in a State court system, "where laws and procedures may differ

substantially from State to State." *Id.* at 647, n. 7. Consequently, it can be presumed that a federal court will have more difficulty in showing a legitimate interest to be protected by rules designed to limit bar admission to persons who have particular familiarity with its rules and procedures.

Thus, *Frazier's* applicability to the review of the New Jersey Supreme Court's rule is limited, because it did not undertake a constitutional review of an in-state office requirement, nor did it involve review of a rule which, like New Jersey's, applies equally to in-state and out-of-state lawyers. Because of this distinction, no true conflict or uncertainty is created by a reading of that decision as compared with this Court's later dicta in *Friedman*, or, indeed, between the decision in *Frazier* and the conclusion of the Third Circuit which Tolchin seeks to challenge here. While the Third Circuit did rely on *Frazier* to reject New Jersey's argument that an in-state office helps it assure attorney competence, *id.* at 648, that conclusion reflects an overly broad reading of that decision. *See Frazier v. Heebe, supra,* 482 U.S. at 647, n. 7. *Frazier* is thus of limited applicability here; in contrast, a review of the discussion of Virginia's requirements in *Friedman* clearly indicates that the New Jersey Supreme Court's rule sets constitutionally permissible standards for the practice of law.

When it adopted its current bona fide office requirement, the New Jersey Supreme Court was cognizant of the need to tailor its rules to establish appropriate standards for legal practice while still allowing the broadest possible participation in New Jersey practice by lawyers from other jurisdictions. Indeed, even before this Court's decision in *Supreme Court of New Hampshire v. Piper, supra,* made clear that a state cannot create different bar admission requirements for qualified out-of-state lawyers, the New Jersey Supreme Court had already taken action to change its own in-state office requirement, which had formerly applied only to non-residents, by making it equally applicable to

New Jersey residents as well. *Matter of Sackman,* 90 N.J. 521, 448 A.2d 1014, 1018-19, 528-529 (1982). In so doing, the New Jersey Supreme Court recognized that it is not in the public interest to exclude non-resident lawyers, but that, rather, the public is better served by efforts "to make more qualified lawyers available to New Jersey's citizens." *Id.* at 1019. The current bona fide office requirement thus was adopted not, as Tolchin suggests, to exclude out-of-state attorneys from New Jersey, but rather to place these attorneys on the same footing as their New Jersey counterparts, in order to achieve "the tailoring of a rule allowing interstate movement while at the same time assuring a sufficient degree of competence, accessibility and accountability." Id. at 1020. As such, it is a proper exercise of the New Jersey Supreme Court's discretion to adopt requirements that protect the quality of its bar, *Goldfarb v. Virginia State Bar, supra,* at 792, and does not run afoul of the Commerce Clause.

D. The In-Person Attendance Requirement of the Skills and Methods Course is Properly Related to the Goal of Attorney Competence.

The rule requiring attorneys who wish to practice in New Jersey to attend, in person, a series of lectures as part of a "skill and methods" course, is also clearly within the class of state bar requirements which this Court has deemed acceptable measures to assure that attorneys are competent and have some knowledge of local law. This Court has, in successive cases dealing with bar admission requirements, approvingly discussed such continuing legal education requirements. For example, *Supreme Court of New Hampshire v. Piper, supra,* 470 U.S. at 285, n. 19, while striking down a state residency requirement for lawyers, suggests that "(a) less restrictive alternative (to assuring attorney competence and knowledge of State law) would be to require mandatory attendance at periodic seminars on state practice. " A similar statement was made in the other

leading case on residency requirements, *Supreme Court of Virginia v. Friedman, supra,* 487 U.S. at 69, which suggests that, as a means of "assuring that its attorneys keep abreast of legal developments,..." a state may wish to "require mandatory attendance at periodic continuing legal education courses." *See also Frazier v. Heebe, supra,* 482 U.S. at 648 ("other more effective means of ensuring the competence of bar members are available to the district courts, including examination or seminar attendance requirements.")

Tolchin argues that the need for such a requirement, like that for a bona fide office, has been negated by technological advances. For example, he suggests that the state could be required to allow an out-of-state attorney to purchase and view video lectures as a reasonable alternative to in-person attendance. However, mandatory attendance serves a specific purpose. As the Third Circuit noted, it assures that attorneys will actually hear, if not listen to, the lectures (App. 23). In addition, while the requirement is not so burdensome as to be unreasonable, participation does demonstrate a level of commitment to practice in New Jersey and learning that State's laws and procedures, whether it be by a New Jersey lawyer or an out-of-state lawyer. Indeed, Tolchin's argument appears to be that it is too troublesome for an out-of-state attorney to travel to course sites in New Jersey. This claim is difficult to reconcile with Tolchin's assertion that he is, at the same time, readily accessible to courthouse locations in New Jersey.

Of course, the mandatory attendance requirement may be problematic for persons located thousands of miles away from New Jersey. However, not only can it be presumed that these individuals comprise a very small number of the pool of lawyers who wish to practice in New Jersey, but they are a group with inherent problems of accessibility to the courts. The Commerce Clause does not, as Tolchin seems to suggest, require New Jersey to use technological

advances in communication to make its courts, its supervisory personnel, or its skills and methods courses travel electronically to practitioners in other states or remote parts of the country. Permission to practice law in New Jersey presumes, as a matter of logic and tradition, that the practice will occur there. Consequently, it is respectfully suggested that this Court should find that Tolchin's petition fails to present a significant question or conflict of law that calls for an exercise of this Court's jurisdiction.

CONCLUSION

For the foregoing reasons, the New Jersey Supreme Court's standards clearly represent an exercise of its discretionary powers to regulate the practice of law within its borders. Any incidental effect that the implementation of these standards may have on interstate commerce is minimal, and more than adequately outweighed by the purpose of assuring attorney availability, accountability and competence. Therefore, it is respectfully suggested that Certiorari should be denied.

Respectfully submitted,

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